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No. 218

In the Supreme Court of the United States

OCTOBER TERM, 1959

HELMUT LEGENLOVE, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	4
1. Petitioner's property was not taken when the Return Order was amended	5
2. Petitioner had a constitutionally adequate remedy under Section 9(a)	6
3. Petitioner's suit under Section 9(a) was barred by limitations	8
Conclusion	10
Appendix	11

CITATIONS

Cases:

Anderegg v. *United States*, 171 F. 2d 127, certiorari denied, 336 U.S. 967	9
Becker Steel Co. v. *Cummings*, 296 U.S. 74	7
Becker Steel Co. v. *Cummings*, 95 F. 2d 319, certiorari denied, 305 U.S. 604	7
Berger v. *Ruoff*, 195 F. 2d 775, certiorari denied, 343 U.S. 950	7
Brownell v. *Nakashima*, 243 F. 2d 787, certiorari denied, 355 U.S. 872	9
Cisatlantic Corp. v. *Brownell*, 131 F. Supp. 406, affirmed, 222 F. 2d 957	9
Clark v. *Uebersee Finanz-Korp.*, 332 U.S. 480	7
Cummings v. *Deutsche Bank*, 300 U.S. 115	6
Cummings v. *Harder*, 102 F. 2d 622, certiorari denied, 307 U.S. 637	7
Grabba v. *Brownell*, 247 F. 2d 402	8
Guessefeldt v. *McGrath*, 342 U.S. 308	6
Hawley v. *Brownell*, 215 F. 2d 36	8, 9
Kohler v. *Clark*, 170 F. 2d 779	7
Kroch v. *McGrath*, 192 F. 2d 416, certiorari denied, 342 U.S. 927	9

Cases—Continued — Page

Kuttroff v. *Sutherland*, 66 F. 2d 500 — 7
McGrath v. *Zander*, 177 F. 2d 649 — 6, 8
Pass v. *McGrath*, 192 F. 2d 415, certiorari denied, 342 U.S. 910 — 9
Pflueger v. *United States*, 121 F. 2d 732, certiorari denied, 314 U.S. 617 — 7
Rogers v. *Schilling*, C.A.D.C., No. 14723, decided May 21, 1959 — 8
Soriano v. *United States*, 352 U.S. 270 — 9
Stochr v. *Wallace*, 255 U.S. 239 — 7
Tiedemann v. *Brownell*, 222 F. 2d 802 — 8
Von Opel v. *Uebersee Finanz-Korporation*, 225 F. 2d 530, certiorari denied, 350 U.S. 935 — 7
Wallace v. *United States*, 142 F. 2d 240, certiorari denied, 323 U.S. 712 — 9

Constitution and Statutes:

Administrative Procedure Act, § 12, 5 U.S.C. 1011 — 5, 8
Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. § 1, *et seq.*:
Section 5(b) — 2
Section 7(c) — 2, 7, 8, 11
Section 9 — 5, 11
Section 9(a) — 2, 4, 5, 7, 8, 9, 10
Section 9(f) — 2, 7, 8, 11
Section 32 — 2, 3, 5, 6, 7, 8
Section 32(a) — 13
Section 32(d) — 13
Section 32(f) — 9, 13
Section 33 — 2, 4, 5, 8, 10, 14
60 Stat. 50 — 3
United States Constitution, Fifth Amendment — 7

Miscellaneous:

Blum-Byrnes Agreement (Memorandum of Understanding between the United States and France), 61 Stat. 4175, 63 Stat. 2507 — 4
8 C. F. R. (1958 Rev.) §504.1 (17 F. R. 1082) — 2
20 F. R. 9871 — 4
Regulations of the Office of Alien Property, §§502.108–502.110 — 3
Vesting Order No. 2044 (8 F.R. 13271) — 2

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 213

HELMUT LEGERLOTZ, PETITIONER

v.

WILLIAM P. ROGERS, ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the district court dismissing the complaint (J.A. 55)[1] is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (Pet. 11–15) is reported at 266 F. 2d 457.

JURISDICTION

The judgment of the court of appeals was entered April 16, 1959 (Pet. 10). The petition for a writ of certiorari was filed on July 15, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The Joint Appendix in the court of appeals is designated herein as "J.A."

QUESTION PRESENTED

Petitioner failed to bring suit under Section 9(a) of the Trading with the Enemy Act by April 30, 1949, as required by Section 33 of that Act, to recover property seized by the Government. The question here is whether he may thereafter obtain judicial review of administrative action taken under Section 32 of the Act, which provides for discretionary administrative returns of vested property.

STATUTES INVOLVED

The pertinent portions of Sections 7(c), 9(a), 9(f), 32, and 33 of the Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. § 1, *et seq.*, are set forth in the Appendix, *infra*, pp. 11–14.

STATEMENT

In 1943, while the petitioner was in German-occupied territory (J.A. 9–10), the Alien Property Custodian, pursuant to the Trading with the Enemy Act, seized his rights as licensor under a patent-license contract with Syngala G.m.b.H. and others (J.A. 1–2). The petitioner's rights "vested in" the Custodian on September 27, 1943.[2] Subsequently, the licensee made payments to the Custodian, and to the Attorney General as his successor

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[2] This was the date that the vesting order (No. 2044) was filed with the Federal Register (8 F.R. 13271). By Section 5(b) of the Trading with the Enemy Act, as amended December 18, 1941, the President was authorized to direct "when" property should vest. This authority was delegated to the Alien Property Custodian and, by regulation, the Custodian ordered that property should be "deemed to have vested" as of the date the order was filed with the Federal Register. See 8 C.F.R. (1958 Rev.) § 504.1 (17 F.R. 1982).

After the termination of hostilities, the petitioner filed a Notice of Claim[3] with the Office of Alien Property on December 16, 1946, for the return of the property (J.A. 7–11) and asked that the claim be considered under Section 32 of the Trading with the Enemy Act, (*infra*, pp. 13–14), which had been added to the Act in 1946. 60 Stat. 50.

The Director of the Office of Alien Property determined that the petitioner was eligible for allowance of his claim under Section 32 as a "persecutee" (J.A. 13), and published in the Federal Register on December 22, 1948, a "Notice of Intention to Return" (J.A. 2–3). On February 28, 1949, he published in the Federal Register a "Return Order."[4] The order directed the return of the amounts collected under the license (totalling $733,293.87) plus "interests and rights," but "subject to any increase or decrease resulting from the administration thereof prior to return, and after adequate provisions for taxes and conservatory expenses" (J.A. 53). Up to and including March 21, 1954, the Office of Alien Property returned to the petitioner a total of $461,762.68 and paid the Director of Internal Revenue $190,674.59 for income

[3] In the Notice of Claim, petitioner stated his address as Vichy, France. He came to the United States in 1947.

[4] The "Return Order" is the order by the Director authorizing and directing the final audit and the preparation of the necessary papers. Regulations of the Office of Alien Property, §§ 502.108–502.110. (Reference is to the 1955 edition of the Regulations, which appear in the Joint Appendix following page 45. There has been no significant change in the regulations since 1955.)

taxes.[5] The Office of Alien Property retained the sum of $30,612.51 for additional taxes (J.A. 44) and on December 15, 1955, the Director amended the Return Order to direct the retention of an additional $48,317.94, on the ground that that amount arose out of war production prior to September 2, 1945, and came within the terms of the Memorandum of Understanding between the United States and France for "return lend-lease" (20 F.R. 9871; J.A. 13, 14).[6]

On the same day, December 15, 1955, the petitioner sued in the District Court for the District of Columbia under Section 9(a) of the Trading with the Enemy Act (*infra*, pp. 11–13) for the recovery of the retained $48,317.94 (J.A. 1–3). He later attempted to amend the complaint also to include the $30,617.51 retained for taxes.[7] The Attorney General moved to dismiss the complaint or for summary judgment on the ground that suit was not brought within the period of time allowed by Section 33 of the Act (*infra*, p. 14) (J.A. 5, 6), and the district court granted the motion on the ground of lack of jurisdiction (J.A. 55). The court of appeals affirmed (Pet. 10, 11–15).

ARGUMENT

Petitioner claims a "taking" of his property occurred on December 15, 1955, when the Attorney Gen-

[5] These figures are from the records of the Office of Alien Property. They were given to the court of appeals and petitioner has not challenged them.

[6] This was the "Blum-Byrnes Agreement" which became effective on May 28, 1946. See 61 Stat. 4175, T.I.A.S. 1928; 63 Stat. 2507, T.I.A.S. 1936.

[7] The court of appeals treated the complaint as so amended (Pet. 12).

eral amended the Return Order to retain the additional sum of $48,317.94 (Pet. 2, 6–8). On the basis of this assumption, he argues that he was entitled to review of the administrative action, either under Section 12 of the Administrative Procedure Act or under Section 9 of the Trading with the Enemy Act (*infra*, pp. 11–13). In fact, however, petitioner's only judicial remedy for the seizure of property by the Alien Property Custodian is under Section 9(a) of the Act. Under Section 33 (*infra*, p. 14), however, actions under Section 9(a) cannot be maintained after April 30, 1949, or more than two years after the property vested in Custodian, whichever is later. Since petitioner's property was vested in September 1943 and this suit was not brought until 1955, he is not entitled to judicial review of the administrative action.

1. *Petitioner's property was not taken when the Return Order was amended.* Petitioner's property clearly vested in the Alien Property Custodian in September 1943 (*supra*, p. 2). Therefore, petitioner's contention that the amendment of the Return Order in December 1955 was a new taking assumes that the Return Order was a binding commitment on the Attorney General to return the property. Only under such an assumption can the amendment of the Return Order, applying to property already vested in the Attorney General, be a "taking."

Section 32 of the Act (*infra*, pp. 13–14), however, under which petitioner claims the right to the return of his property, gives a claimant no right or title to or in vested property until the time of actual payment or

delivery to him.[8] Section 32, which was added to the Act in 1946 primarily to authorize discretionary administrative returns of vested property to "'technical' enemies," who could not maintain suit under Section 9(a) of the Act (*Guessefeldt* v. *McGrath*, 342 U.S. 308, 314–315; *McGrath* v. *Zander*, 177 F. 2d 649, 651 (C.A.D.C.)), provides that a return is not to be made unless and until the President or his delegate finds that "such return is in the interest of the United States" (*infra*, p. 13). The discretion relates to the return itself, and therefore clearly continues until the point of the actual return, since Section 32 itself expressly states in subsection (f) that the publication of a notice of intention "confer[s] no right of action" (*infra*, p. 14). Nor does the Act contain any other provision for a binding commitment to make a return. Accordingly, the Return Order, under the Regulations, is merely the direction of the Attorney General to his subordinates to make the final audit and to prepare the necessary papers (*supra*, p. 3, fn. 4). Since the Return Order was not a binding commitment, the amendment of that Order obviously did not constitute a seizure or taking of petitioner's property.

2. *Petitioner had a constitutionally adequate remedy under Section 9(a).* Petitioner's property was seized in September 1943 by the vesting order. Property so seized could be recovered by a non-enemy claimant

[8] The same situation existed under the post-World War I return provisions of Section 9(b). See *Cummings* v. *Deutsche Bank*, 300 U.S. 115, 121–122.

by bringing suit in equity under Section 9(a), which petitioner in fact cited as the basis for his complaint in the district court (J.A. 1). Such an action is clearly adequate to protect all rights guaranteed by the Fifth Amendment. *Stoehr* v. *Wallace*, 255 U.S. 239, 246; *Becker Steel Co.* v. *Cummings*, 296 U.S. 74, 79; *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 487.

The remedy under Section 9(a) is, by virtue of the express language of Sections 7(c) and 9(f) of the Act (*infra*, pp. 11, 13), the "sole relief and remedy of any person having any claim" to vested property and is therefore the only form of proceeding in which the United States has consented to be sued with respect to such property. *Becker Steel Co.* v. *Cummings*, *supra*, 296 U.S. 74; *Von Opel* v. *Uebersee Finanz-Korporation*, 225 F. 2d 530 (C.A.D.C.), certiorari denied, 350 U.S. 935; *Berger* v. *Ruoff*, 195 F. 2d 775 (C.A.D.C.), certiorari denied, 343 U.S. 950; *Pflueger* v. *United States*, 121 F. 2d 732 (C.A.D.C.), certiorari denied, 314 U.S. 617; *Cummings* v. *Hardee*, 102 F. 2d 622, 627 (C.A. D.C.), certiorari denied, 307 U.S. 637; *Kuttroff* v. *Sutherland*, 66 F. 2d 500 (C.A. 2); *Becker Steel Co.* v. *Cummings*, 95 F. 2d 319, 320 (C.A. 2), certiorari denied, 305 U.S. 604; *Kochler* v. *Clark*, 170 F. 2d 779, 780 (C.A. 9). Specifically, as the Court of Appeals for the District of Columbia Circuit has held in a series of decisions, the "sole relief and remedy" provisions of the Act bar any relief or remedy by way of judicial review of administrative action under Section 32,

under the Administrative Procedure Act[9] or otherwise. *McGrath* v. *Zander, supra*; *Hawley* v. *Brownell*, 215 F. 2d 36 (C.A.D.C.); *Tiedemann* v. *Brownell*, 222 F. 2d 802 (C.A.D.C.); *Rogers* v. *Schilling*, C.A. D.C., No. 14723, decided May 21, 1959, not yet officially reported. Thus, as a matter of statutory construction and the unanimous decisions of the federal courts, the only judicial remedy available to petitioner was a suit under Section 9(a).

3. *Petitioner's suit under Section 9(a) was barred by limitations.* As a statute giving the consent of the United States to be sued, Section 9(a) is subject to such limitations as Congress may impose. By Section 33 of the Act (*infra*, p. 14), Congress provided that no suit under Section 9 might be maintained after April 30, 1949, or after the expiration of two years from the date the property "vested in" the Alien Property Custodian, "whichever is later," except that any period of time during which a claim for return of the property was pending should be excluded from the computation of the two years. The vesting order with respect to petitioner's property became effective September 27, 1943 (*supra*, p. 2), and that was the date the property "vested in" the Custodian. Since petitioner did not file his notice of claim until December 1946, more than two years after the date of vesting, the two-

[9] Petitioner suggests (Pet. 4, 5) that because Section 32 of the Trading with the Enemy Act was enacted in 1946 after Section 12 of the Administrative Procedure Act, 5 U.S.C. 1011, administrative determinations under Section 32 are subject to review. But the sole relief and remedy provisions of Sections 7(c) and 9(f) date back to 1918 and 1917, respectively, and have not been amended in any respect.

year period was not extended by the pendency of his claim and April 30, 1949, was the "later" date before which suit had to be brought. Petitioner, however, did not file his suit until December 1955 or over six years too late, and, therefore, the district court did not have jurisdiction over the action. *Pass* v. *McGrath*, 192 F. 2d 415 (C.A.D.C.), certiorari denied, 342 U.S. 910; *Kroch* v. *McGrath*, 192 F. 2d 416 (C.A. D.C.), certiorari denied, 342 U.S. 927; *Hawley* v. *Brownell*, 215 F. 2d 36 (C.A.D.C.); *Brownell* v. *Nakashima*, 243 F. 2d 787 (C.A. 9), certiorari denied, 355 U.S. 872; *Grabbe* v. *Brownell*, 247 F. 2d 402 (C.A. 2); *Cisatlantic Corp.* v. *Brownell*, 131 F. Supp. 406 (S.D.N.Y.), affirmed, 222 F. 2d 957 (C.A. 2).

As a time-limit-consent statute, Section 33 is not subject to any exceptions, unless expressly stated. *Soriano* v. *United States*, 352 U.S. 270, 276. Therefore, since the Attorney General has been given no authority to waive or extend the period of limitations, his action in allowing the claim administratively in December 1948 did not give the petitioner any additional time. Cf. *Cisatlantic Corp.* v. *Brownell*, *supra*; *Wallace* v. *United States*, 142 F. 2d 240 (C.A. 2), certiorari denied, 323 U.S. 712; *Anderegg* v. *United States*, 171 F. 2d 127 (C.A. 4), certiorari denied, 336 U.S. 967.[10]

[10] Petitioner seems to suggest that the Return Order of the Attorney General lulled petitioner into failing to file a notice of claim under Section 9(a) within the limitations period (Pet. 5). But the wording of subsection (f) of Section 32, the very provision under which petitioner filed his notice of claim in December 1946, clearly warned petitioner that the Return Order of the Attorney General gave him no vested rights. Sim-

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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ilarly, Section 33 expressly provides a limitations period for bringing an action under Section 9(a). Thus, petitioner was on notice that, if the Attorney General revoked or modified his intention to return after the limitations period as to Section 9(a) had run, petitioner would be foreclosed from judicial review of that action if he chose to make his notice of claim under Section 32 (as he did) rather than Section 9(a) (as he was entitled to do). See the opinion of the court of appeals, Pet. 13-14. But even if petitioner could reasonably have relied on the Return Order in not bringing suit under Section 9(a), the government is not bound by estoppel in a case such as this.

APPENDIX

The Trading with the Enemy Act, 40 Stat. 411, as amended, 50 U.S.C. App. 1, *et seq.*, provides in pertinent part:

Section 7(c):

* * * * *

> The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act * * *.

* * * * *

Section 9:

> (a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the

money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided*, That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other property. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the United States District Court for the District of Columbia, or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or

decree shall be entered against the claimant or suit otherwise terminated.

* * * * *

(f) Except as herein provided, the money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, shall not be liable to lien, attachment, garnishment, trustee process, or execution, or subject to any order or decree of any court.

* * * * *

Section 32(a):

The President, or such officer or agency as he may designate, may return any property or interest vested in or transferred to the Alien Property Custodian (other than any property or interest acquired by the United States prior to December 18, 1941), or the net proceeds thereof, whenever the President or such officer or agency shall determine—

* * * * *

(5) that such return is in the interest of the United States.

Section 32(d):

Except as otherwise provided herein, and except to the extent that the President or such officer or agency as he may designate may otherwise determine, any person to whom return is made hereunder shall have all rights, privileges, and obligations in respect to the property or interest returned . . . which would have existed if the property or interest had not vested in the Alien Property Custodian, but no cause of action shall accrue to such person in respect of any deduction or retention of any part of the property or interest or proceeds by the Alien Property Custodian for the purpose of paying taxes, costs, or expenses in connection with such property or interest or proceeds; * * *

Section 32(f):

> At least thirty days before making any return to any person other than a resident of the United States * * * the President or such officer or agency as he may designate shall publish in the Federal Register a notice of intention to make such return, specifying therein the person to whom return is to be made and the place where the property or interest or proceeds to be returned are located. Publication of a notice of intention to return shall confer no right of action upon any person to compel the return of any such property or interest or proceeds, and such notice of intention to return may be revoked by appropriate notice in the Federal Register. * * *

Section 33:

> * * * No suit pursuant to section 9 may be instituted after April 30, 1949, or after the expiration of two years from the date of the seizure by or vesting in the Alien Property Custodian, as the case may be, of the property or interest in respect of which relief is sought, whichever is later, but in computing such two years there shall be excluded any period during which there was pending a suit or claim for return pursuant to section 9 or 32(a) hereof.

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